



**Me Jacques Pourciel**

**Continental Law antidotes to the subprime mortgage turmoil**

**Question 1:**

**Could some institution of preventive justice, such as a civil law notary help prevent consumers from entering to improvident and excessive mortgage transaction?**

Preventive justice is a civil law concept which is very different from common law due process of contentious justice. Preventive justice in a word is where an official authority- the civil law notary- intervenes at an early stage in certain defined transactions, most usually real estate, and in a neutral capacity, acting for neither party, ensures compliance with the law, acting impartially, giving legal advice to the parties, and thus, with a view to anticipating future litigation and settling differences at the outset, rather than leaving problems to be sorted out by the courts subsequently;

As a French civil law notary, I will explain how a loan, legal charge or mortgage given as security and how registration is handled.

A contractual mortgage is usually linked to a loan.

That means that a borrower who needs a loan to finance, say, a real estate transaction, must, as security to repay the loan, agree to a legal charge or mortgage being given to the lender, which in most cases is a bank.

They are two distinct phases:

- the implementation of the loan
- putting into place of the legal charge given as security

The implementation of the loan, after the lender has agreed to it in principle, requires that the lender issues a loan offer setting out all the conditions, amount, term, interest, repayment, default and the required security. The loan offer must be sent by the lender to the borrower by registered mail.

On receipt, the borrower has, by law, a cooling off period of eleven days in which to expressly accept or reject the loan offer.

Up to this point, there is no independent or official intervention in the process. The contractual relationship lies directly between the lender and the borrower, and this latter is entitled to decide within a timeframe of four months whether to have the loan on the terms or not, and particularly to accept the legal charge required as security indicated in the loan offer.

The creation of the mortgage requires, in accordance with the Civil Code, the drafting of an authentic deed drawn up by a French notary. The choice of notary is at the discretion of the borrower and the fees are paid by him .

The civil law notary has, inter alia, duties of identifying the borrower, verifying his civil capacity, checking the legal title and investigating whether there are existing legal mortgages registered against the property.

Further, the civil law notary has in French law the obligation to provide legal advice to the borrower to ensure that the loan is made on normal banking and financial terms, and the notary must provide pertinent explanations of the terms of the loan agreement and suspend the process, if in the notary's opinion, certain terms are unclear and/or are not even-handed.

Consent to taking the mortgage must be freely given by the borrower in full knowledge of the facts, and the notary must ensure that this is done

The mandatory intervention of a civil law notary allows the borrower to be made aware of the extent of his commitments, and the Civil Code considers a mortgage as being a commitment carrying serious personal and legal consequences, which requires the intervention of a public authority- the civil law notary- whose duty it is to verify the even-handedness of the contractual relationship between the parties. A mortgage is therefore never granted or taken lightly nor is it ever implemented by the bank alone.

The French system, it seems to me, although it may appear bureaucratic in documentary terms, ensures security of the transaction by making sure that the lender acquires a good and enforceable legal charge as security and that the borrower is fully informed of his commitment and liability.

Thus the notary in France has some influence to prevent improvident and excessive mortgage transactions from taking place, but of course this also requires common sense by the borrowers and old fashioned banking ethics by the lender.

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**Question 2:****Are there practical ways to provide consumers in residential real estate transactions with independent and impartial legal advice and guidance?**

In France, the entering into of a real estate transaction may take various forms depending on whether there is an intermediary involved, for example a real estate broker.

When the parties have agreed terms on the price and the property, the parties usually sign a pre contract which sets out the conditions of the transaction which are usually subject to the purchaser obtaining a loan to finance his purchase. This is a mandatory condition precedent in French law where individual are involved.

The pre-contract may be drawn up by a broker, who is not a lawyer, or by a civil law notary who is an independent public official appointed to office by the State and supervised by it; the civil law notary is a member of a liberal profession, qualified to practice law in France, subject to a State imposed fee tariff and whose liability towards clients is very wide.

The parties may freely choose their notary.

Intervention of a notary guarantees that the parties receive impartial advice and the notary has inter alia a duty to prepare an even-handed contract in terms of the obligations arising from it.

Whether the pre-contract has been drafted by a broker or a civil law notary, this first phase is invariably followed by a second phase, which is the important one, in preparing the notarial authentic deed of transfer which restates the terms of the pre-contract and confirms the performance of the conditions precedent.

It is generally accepted that the pre-contract prepared by a civil law notary as opposed to one prepared by a broker is far superior as it allows both parties, purchasers and vendors, to receive information on the extent of their respective rights and obligations. Further, the civil law notary at the time of signing the pre-contract has obtained a maximum of information destined to enlighten the parties with the details and specifications identified through various inspections required by law, regulations or otherwise, that the purchaser may have made.

These include:

- measuring the usable area if the property is an apartment
- inspection for termites
- inspection for asbestos
- Inspection for lead in paint
- inspection of the gas and electrical system
- Inspection of the energy performances output of the central heating plant
- and also investigation into natural and technological risks, these include the risk of avalanche, forest fire, flood, land slip, industrial pollution etc

In most cases, the civil law notary is also able to obtain information on the planning regulations applicable to the property, is able to examine the vendor's title, the cadastral plan, and to check whether there are legal charges registered against the property.

In my experience no real estate broker is able to do this.

After signing the pre-contract, a copy is served by post mail on the purchaser giving him statutory cooling off period of seven days, to withdraw unilaterally from the contract as French law strives which is to avoid the risk of an impulse purchase. During this period this purchaser is able to obtain further information from the notary.

In this phase, you will note that the civil law notary occupies a central place in the transaction, if called upon; he does not get involved in price negotiation, but intervenes as impartial adviser to the parties thereby providing legal security to the transaction.

At this stage of the pre-contract, if some information, conditions or procedures precedent have not been performed, they will be the subject of specific conditions precedent.

The second phase of closing the sale is implemented when the purchaser is able to pay the price and the vendor is able to deliver up the property.

In France, it is at this second phase that the law requires the mandatory intervention of the civil law notary, who alone is allowed to access the cadastral, and land registers.

Whether the pre-contract was prepared by a real estate broker or by a notary, the drafting by the notary of the notarial authentic deed of sale must set out all the conditions contained in the pre-contract and verify that all conditions precedent contained in it have been performed.

The French civil law notary has a dual mission:

-One is the public duty to authenticate the deed of sale, impartially, using powers delegated to him by the State, which ensures the security of the transaction

-And the second is to guarantee that the vendor receives the net proceeds of sale safely and that purchaser acquires good title to the property

As extra security for both parties, the purchase and sale price must transit through a special deposit account that the civil law notary must keep at the Cuisse des Depots et Consignations which works in close cooperation with French Treasury.

Once the notarial deed of sale is executed by both parties and by a notary and the transfer of ownership is instantaneous, the purchaser is able to claim and utilise his right of ownership vis à vis anyone, whether an individual or a bank.

Duties and taxes arising from a real estate transaction form part of the obligations of the French civil law notary both to the vendor and the purchaser to whom advice and assistance is given. The civil law notary, having inspected the file, is responsible on the one hand for settling on behalf of the vendor any capital gains tax due, and on the other hand to pay on behalf of the purchaser all transaction duties levied. These are obligations imposed on the notary and of course the notary must first of all collect the amounts necessary to pay duties and taxes.

I hope that I have sufficiently explained the essential role given to the French civil law notary by French law; this can be explained as an interface which guides and advises the parties on their respective rights and obligations but involves invoking the professional liability of the notary.

Consequently, if a real estate transaction appears to be weighted in favour of one party alone, the civil law notary must refuse to authenticate the deed of sale.

The civil law notary, having had a partial State delegation of powers vested in him, regulates the contractual relationships between the parties, and thereby avoids or reduces recourse to litigation.

This concept of preventive justice.

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**Question 3:**

**What is the most cost effective means of effectuating residential real estate transactions with a high degree of efficiency and legal certainty?**

This question is particularly judicious and appropriate.

The question could have been phrased merely as “what is the cheapest way of achieving a real estate transaction?” -but the question asked is much more pertinent. Effectively what is asked is to put the cost of achieving the transaction and the degree of legal efficiency and security into perspective.

To reply fully to this question, one must distinguish between two aspects of a real estate transaction:

Firstly those matters which relate to the contractual rights and obligations existing between the vendor, the purchaser and if appropriate the lender

And secondly those matters which concern mandatory French public policy required updating the cadastral and land registries.

As regard the first, the contractual relationship relates purely to legal considerations, the only intervening party being the civil law notary whose obligations are defined elsewhere and his guarantee is provided at the most cost effective price possible especially because the professional remuneration of a civil law notary is regulated by the State. Thus preventing both wide fluctuations in fee levels and also excesses. It seems to me obvious that a proliferation of contractual players, such as attorneys, title insurance companies, brokers and others can only increase the cost payable but do nothing to increase the legal efficiency and security of the transaction. At the risk of repeating myself, the civil law notary has a very wide liability vis à vis the parties which has been extended by case law to be construed as not only an obligation for the notary to use best endeavours but to achieve a successful outcome-this is known in French law as “ an obligation de resultats”.

As regard the second aspect, it is self evident that a State must have knowledge of who owns land over which it exercises its sovereignty, not only to protect the integrity of the territory, but also to maintain social peace and avoid real estate conflicts.

Modern States bases a small percentage of their budgetary resources on real estate ownership. And up-to-date and effective cadastral and land registers are particularly useful.

It is for States to determine which cadastral and land registry systems are best suited to their needs and to operate the same efficiently. In France, the cadastre and land registers were created by the State and operated by it, but the data necessary to update them is derived for the most part by civil law notaries. This results not only from real estate transactions but more widely in identifying any transfer of real estate ownership made by gifts inter vivos or on death

The considerable know-how and expertise of French notaries is much appreciated, and relied upon, by central government, and the efficient keeping of the registers is dependent to a large extend on their professionalism.

It should be noted that in France, the cadastral and land registers do not create rights of ownership *per se*, they merely record them, and rights of ownership are only created by contracts or in rare cases by order of a Court.

The intervention by the notary to access and update the cadastre and land registers does not involve further fees, but the keeper of the land register will impose a modest contribution to its upkeep.

Although absolute security does not exist in the real world, the French real estate property ownership transfer and land registration system for all intents and purposes achieves this because all French land is identified and linked to public or private real estate ownership

The legal security and efficiency of real estate transaction derives partly from the quality of contract and partly from the proper operation of the land registers by civil law notaries who are in the French civil law system, public officials, who are not employed by the State but who are, also, private lawyers obliged to provide a public service, the cost for which is decreed by the State.

To sum up, this is a brief explanation of the dual role of the French civil law notary which so confuses people who are not brought up in the civil law system.

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